

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
November 28, 2007 Session

SHARON KAY LONG

v.

JAMES ERDINE LONG

Appeal from the Chancery Court for Sumner County
No. 2005D-276 Tom E. Gray, Chancellor

No. M2006-02526-COA-R3-CV - Filed July 3, 2008

This is a divorce case. The parties had three minor children at the time of the divorce. The husband held a management position at a publicly-traded company, and the wife was a homemaker. As part of his compensation, the husband received stock in his employer company. After the wife discovered that her husband had engaged in an affair, she filed for divorce. During the parties' separation, the husband relocated to Maryland. While the divorce case was pending, the husband received a bonus check; he was ordered to deposit the bonus monies with the court clerk. The husband was also ordered to pay spousal support and child support *pendente lite*. Anticipating that the share price of the parties' stock would fall, the husband asked the wife to agree to sell the stock, but she refused. Subsequently, the stock price decreased substantially. After a trial, the trial court granted the wife a divorce on the grounds of adultery. In its division of the marital assets, the trial court refused to find that the wife's refusal to sell the parties' stock amounted to a dissipation of marital assets. Half of the husband's bonus earnings that had been held by the court clerk were awarded to the wife. The trial court also ordered the husband to pay child support and rehabilitative alimony for ten years, and all of the children's transportation costs for visiting him in Maryland. The wife was awarded the federal income tax exemptions for all three children. The husband appeals the award of half of his bonus check to the wife, arguing that his *pendente lite* support obligations were based in part on this bonus, in effect "double-counting" the bonus. He also appeals the division of the marital estate, the trial court's refusal to consider the wife's alleged dissipation of assets, the award of spousal support, and various provisions in the permanent parenting plan. We vacate the award of spousal support with regard to its duration and remand for the trial court to consider a shorter duration or a "tapering off" of the award. The remainder of the trial court's decision is affirmed.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed in Part,
Vacated in Part, and Remanded**

HOLLY M. KIRBY, J., delivered the opinion of the Court, in which ALAN E. HIGHERS, P.J., W.S., and DAVID R. FARMER, J., joined.

Kimberley L. Reed-Bracey, Goodlettsville, Tennessee, for the appellant, James Erdine Long

Laura Y. Goodall, Gallatin, Tennessee, and Robert Todd Jackson, Brentwood, Tennessee for the appellee, Sharon Kay Long

OPINION

Plaintiff/Appellee Sharon Kay Long (“Wife”) and Defendant/Appellant James Erdine Long (“Husband”) were married on March 4, 1989 in Woodbridge, Virginia. Three children were born of the marriage, two boys and one girl. All three are minors. Husband also had two children from a previous marriage.

When the parties married, they were living in Orlando, Florida. At the time, Husband was the manager of a Lowe’s Home Improvement store in Orlando, and had been employed by Lowe’s for about ten years. Wife was a clerical employee for a computer company. In April 1989, soon after the parties’ marriage, Husband quit Lowe’s to go to work for Builder’s First Source (“BFS”), a publicly-traded construction supply company. Husband’s new job with BFS required that the parties move to Virginia. Their first child, Jeffrey, was born in Virginia in 1993. After Jeffrey’s birth, Wife quit working outside the home to become a homemaker.

In approximately 1994, Husband took a management position with BFS that required the parties to move back to Orlando. The parties’ second child, Justin, was born in December 1996. In August 1999, the family moved to Tennessee so that Husband could manage a new BFS store in Gallatin, and the parties’ third child, Brooke, was born in Tennessee soon after, in October 1999. Eventually, the family built a home in Hendersonville, Tennessee, which has since been the marital residence.

As part of his continued employment with BFS, Husband’s compensation included shares of BFS stock options. He eventually acquired several thousand shares.

At some point during the marriage, Husband began an affair with another woman. During the marriage, Husband went on trips with his paramour and bought her jewelry and other gifts. In addition, during the marriage, Husband incurred substantial gambling debts.

As a result of Husband’s extramarital affair, Wife filed a complaint for divorce in the Sumner County Chancery Court on June 13, 2005, alleging irreconcilable differences, inappropriate marital conduct, and adultery. With her complaint, Wife filed a proposed temporary parenting plan and a motion for temporary spousal support. Husband filed a separate complaint for divorce in the Sumner County Circuit Court, as well as a proposed temporary parenting plan.¹ Subsequently, an agreed order was entered transferring Husband’s action to the Chancery Court for Sumner County and consolidating it with Wife’s action.

¹Husband attached a child support worksheet to his proposed temporary parenting plan. Husband’s worksheet indicates that Husband had a gross monthly income of \$20,561 and that Wife had no monthly income.

Soon after both actions were commenced, the parties agreed to divide up a joint checking account. That account held in excess of \$220,000, part of which was Husband's 2004 bonus money. Husband and Wife each received approximately \$110,000, and some money remained in the account to pay future bills.

After consolidation of the actions, the trial court entered an order requiring Husband to pay Wife spousal support in the amount of \$2,335 per month, and enjoining either party from making any withdrawals from two other joint checking accounts. The court also entered a temporary parenting plan designating Wife as the primary residential parent for the parties' three children, and requiring Husband to pay \$2,425 per month in temporary child support.

On November 29, 2005, the trial court entered an agreed order closing the parties' joint checking accounts and dividing the balance equally between Husband and Wife. The order required that Husband pay the \$15,000 VISA credit card balance, but reserved the issue of whether Wife should be responsible for any portion of the debt.

At some point during the parties' separation, Husband moved to Maryland. He remained employed with BFS. In early 2006, Husband received a bonus check from his employer in the amount of \$137,069.27. Wife filed a motion to compel Husband to either pay her half of the bonus money or, in the alternative, to deposit the entire check with the court clerk. In response, Husband argued that he would not be able to meet his *pendente lite* support obligations without using the bonus money. After a hearing, the trial court ordered Husband to use approximately \$30,000 of the bonus money to pay the parties' 2005 joint tax obligation, and ordered Husband to deposit the balance with the clerk to be distributed after the trial.

In May 2006, the parties and their attorneys corresponded about the jointly-owned BFS stock and stock options. Husband strongly urged the immediate exercise of the options and sale of all stock, based on his conviction that the stock price would soon fall drastically. Wife refused to do so. On June 5, 2006, Husband filed a motion with the trial court requesting permission to sell some of the BFS stock.² He alleged that the share price of BFS stock had been "plummeting," asserted that the parties had already lost \$22,000 in one week as a result of the stock price decline, and characterized Wife's refusal to agree to sell the stock as a dissipation of marital assets. Husband's motion was continued until the trial.

In preparation for the trial, the parties filed with the trial court a list of stipulations, including a stipulation that Wife was entitled to an absolute divorce based on Husband's adultery. They also stipulated to the value of several assets, including retirement and investment accounts and the funds held by the court clerk. In Husband's trial memorandum, filed before the trial, he asserted that the loss in value that resulted from Wife's continued refusal to permit the sale of the BFS stock was in excess of \$123,000.

²Under Tennessee Code Annotated § 36-4-106(d), upon the filing of the complaint for divorce, Husband became enjoined from "transferring, assigning . . . or in any way dissipating or disposing, without the consent of [Wife] or an order of the court, of any marital property." T.C.A. § 36-4-106(d)(1)(A) (2005).

The trial was held on August 15, 2006.³ The trial court heard testimony from Husband and Wife. The court also heard testimony at the outset of the trial from Wife's brother, Wayne Canada, who was Husband's immediate supervisor at BFS. Canada initially testified about Husband's income at BFS, stating that Husband's base salary was \$138,350 per year, and that he could earn up to \$50,000 in bonuses based on his performance. In addition to Husband's income, Canada discussed the declining value of BFS stock. He said that, during 2006, the stock dropped from \$22 per share to \$15 per share, and indicated that he sold a part of his BFS holdings at around the time Husband asked Wife to agree to sell some of their shares.

Wife testified next. Before the parties' first child was born, Wife did clerical work for a computer company, earning approximately \$20,000 per year. Once their first child was born in 1993, Husband and Wife agreed that Wife would stay home to raise their children and take care of the home.

Wife testified about the parties' income and assets. She opined that the marital home had a value of \$462,000, based on an offer to purchase that the parties had received, but which was later withdrawn. Wife asked the trial court to award the marital home to her in the division of marital property. Regarding the joint checking account that the parties had divided after the divorce actions were filed, Wife asserted that the approximately \$110,000 that she received in the division should be considered her separate property. Wife also submitted into evidence the parties' joint tax returns for the years 1990 through 2004, which showed that Husband's adjusted gross income for the years 2000 through 2004 ranged from \$159,000 to \$267,000.

Referring to the parties' dispute about the sale of the BFS stock, Wife testified that she considered ownership of the BFS stock to be a "long-term" investment. She acknowledged that Husband had sent her an email indicating that her brother, Canada, had sold some of his stock, and that Husband wanted to sell half of their BFS shares. She explained, "I felt it was marital property, [and] didn't know how the division of the property would go until the final hearing. And I totally wasn't comfortable with selling the stock at that point in time."

Wife then testified about how Husband had utilized reimbursement checks from his employer to hide his dissipation of their marital assets. Wife testified that, in December 2004, Husband set up an account in his name only at SunTrust Bank ("SunTrust account"), without her knowledge. Over a period of several months, Husband would pay business expenses out of the parties' joint checking account, then deposit the reimbursement checks from BFS into the SunTrust account rather than the joint checking account, and use the SunTrust account for gambling debts, gifts to his

³During preliminary discussions at the trial, the parties addressed allocation of the federal income tax exemption for the parties' three children. Wife's attorney stated, "I think we are in agreement. My client will claim Jeffrey and Brooke, he'll claim Justin." Husband's attorney then said, "At this juncture the mother [has no income,] so at this point we believe it would be prudent that he would be able to claim all of the children." Husband's attorney added, "However, we would like some language that the mother shall prepare a tax return and show it to the father and then he could elect to pay the mother what she would have gained by [claiming] those children . . ." Wife's attorney responded that this scheme was "overly burdensome" on Wife, and reiterated that Husband should claim one child and Wife could claim the other two.

paramour, and other non-marital uses. Wife stated that Husband had deposited \$72,244.12 into the SunTrust account. Exhibits introduced into evidence at the trial corroborated her testimony. Prior to that, when the parties lived in Florida, Husband had a similar separate account, also used without Wife's knowledge. In addition, on one occasion, Husband received a reimbursement check from BFS in the amount of \$21,880.71, and simply cashed it and used it for his own purposes. Other smaller reimbursement checks were cashed as well. All told, Wife asserted, Husband dissipated a total of \$175,091. She asked the trial court to award her this amount against Husband's share of the marital estate.

In Wife's proposed division of the marital estate, she requested that the trial court award her the marital home, her automobile, half of several retirement and savings accounts owned by the parties, half of the parties' BFS shares, and half of the funds held by the court clerk. This proposed division included consideration for Husband's dissipation of the marital estate.

In addition, Wife asserted a need for spousal support. Wife submitted into evidence a list of monthly expenses totaling \$5,983.50. She was working part-time at a cookie store, earning less than \$200 per week. For rehabilitation, Wife testified that she planned to go to school part-time with a goal of getting a teaching certificate in approximately three years. She sought rehabilitative alimony of \$2400 per month, based on the age of the parties' youngest child (6 years old) at the time of trial. She also asked for attorney's fees.

Finally, Wife testified about her proposed parenting plan. Since the parties separated and Husband moved to Maryland, she said, she had taken the children to see Husband in Maryland four times. Wife had misgivings about the children flying alone, based in part on the oldest child's serious peanut allergy. In light of these concerns and the children's school and extracurricular activities, Wife proposed that the children visit Husband only once per school semester. She suggested that the remainder of the visits take place in Tennessee, requiring Husband to do the traveling. Although Wife testified that she was proposing that she claim Jeffrey and Brooke on her federal income tax exemptions and Husband claim Justin, her proposed parenting plan allocated all three exemptions to her.

Husband testified last. He valued the parties' marital home at \$527,284, based on a May 2006 tax appraisal of \$501,000 and improvements to the home not taken into account in the tax appraisal. No appraisal was tendered as an exhibit at trial.

Husband next testified about his bonus money, which was being held with the court clerk. He maintained that those funds should be awarded to him because the trial court had set his *pendente lite* obligations with reference to his base salary and the bonus money held by the court clerk, as though he had access to the bonus money. He testified that, in order to satisfy his *pendente lite* obligations while his bonus money was being held by the court clerk, he had to deplete various investment accounts and savings accounts.

Husband said that the parties owned 6500 shares of BFS stock, as well as stock options, all acquired during the marriage. He asserted, however, that 5000 of the 6500 shares were purchased with the proceeds from the sale of stock from another company, which he had purchased before the

marriage. Based on this assertion, Husband claimed that only 1500 of the 6500 shares of BFS stock were marital property.

Husband argued that Wife's refusal to sell any of the BFS stock amounted to a dissipation of assets. He testified that he first asked Wife to agree to sell some of the parties' BFS shares on May 10, 2006, when BFS stock was trading at \$23.50 per share. He said that he told Wife that the value of the stock was dropping rapidly, and asked Wife to agree to sell all 6500 shares and exercise the parties' stock options. Wife refused. By August 1, 2006, BFS stock had dropped in price to \$16.40 per share. Husband asserted that Wife's refusal to consent to the sale of the stock resulted in a loss to the marital estate of \$141,644. In his proposed division of property, Husband contended that Wife should be required to reimburse him for half of the loss in value of the stock and options owned jointly and for all of the loss in value of the 5000 shares that were purportedly his separate property.

Although Husband did not contest Wife's request to be designated as the children's primary residential parent, he disputed other aspects of Wife's proposed parenting plan. He first took issue with the provision that the children would only visit him in Maryland once per semester, because it was more expensive for him to visit the children than for the children to visit him. His visits to Tennessee involved expenses for food, lodging, and a rental car that would not be incurred if the children came to Maryland to visit him. He asked the trial court to require the parties to share the transportation costs necessitated by his move to Maryland. He testified that, when he moved to Maryland, he was under the impression that Wife planned to move there as well. Husband conceded, however, that the woman who was his alleged paramour lived twenty minutes from his home in Maryland.

Husband asked the trial court to allocate to him the federal income tax exemptions for all three of the children because until Wife began working full time he would have substantially more income, and the exemptions would be more valuable to him. He suggested that, once Wife began working full-time, she could claim the exemptions for the parties' youngest child and oldest child, leaving him the exemption for the middle child. In his trial memorandum, however, Husband submitted a proposed parenting plan in which Wife would claim the exemption for Jeffrey and Brooke and he would claim the exemption for Justin.

Husband disputed Wife's need for spousal support, noting that Wife has a college degree and asserting that she is "perfectly capable of working." In the event Wife obtained her teaching certificate in three years, he said, she would no longer need any spousal support.

In Husband's proposed division of marital assets, Wife would receive the marital home, while the retirement and investment accounts would be allocated to him. Husband agreed to assume all of the parties' marital debt.

Finally, Husband testified regarding his income and expenses. He claimed total monthly expenses of \$13,946; this included expenses incurred in taking care of the children. Husband testified that, assuming a bonus of \$25,000, he expected to earn approximately \$235,000 in gross

income for 2006. Husband conceded that he incurred expenses during the parties' separation for cosmetic surgery and trips to the Bahamas and to New York City with his girlfriend.

After hearing all of the parties' witnesses, the trial court entered a final decree of divorce on November 1, 2006. After granting the divorce to Wife based on Husband's adultery, the trial court made findings as to the parties' separate and marital property. The trial court found that all of the shares of BFS stock, as well as the stock options, were marital property. It valued the marital home at \$462,000, in line with Wife's valuation. The total marital estate was valued at \$1,543,706.96. The trial court rejected Husband's contention that he was forced to use his separate property—including the \$110,000 he received when the parties initially divided up their joint checking account—to satisfy his *pendente lite* obligations, commenting that, "Husband's income from his employment was sufficient to make the child support and the temporary support without utilizing the \$110,000."

The trial court then addressed the dissipation of marital assets alleged by both parties. It found that Husband had dissipated substantial assets "by gambling and paying expenses and purchasing gifts for his paramour." The trial court stated, "The equitable division of the marital estate by the Court took into consideration the dissipation of marital assets by the Husband" It declined to consider Wife's refusal to sell the parties' BFS stock as a dissipation of assets.

In the trial court's distribution of the marital estate, Wife received, among other assets, the marital home, half of the funds held with the court clerk, her automobile, half of the vested BFS stock options, and half of the 6500 shares of BFS stock. Overall, Wife was awarded approximately sixty percent of the marital estate. Husband was awarded the balance, which came to approximately forty percent of the overall marital estate. Wife was awarded rehabilitative alimony of \$2000 per month for a period of 120 months (ten years). The court based its award of spousal support on Wife's need and Husband's ability to pay. The duration of the award, the trial court explained, was established by considering "the age of the youngest child." The trial court denied Wife's request for her attorney's fees.

In the permanent parenting plan, Wife was designated as the primary residential parent. The plan gave the parties joint decision-making authority, and required mediation in the event of a disagreement with respect to educational, non-emergency healthcare, and religious upbringing decisions. Wife was given "tie-breaking" authority on decisions regarding extracurricular activities. Husband was ordered to pay child support in the amount of \$2,425 per month. Wife was awarded the federal income tax exemptions for all three children. Husband was ordered to pay the transportation expenses for the children's visitation with him.

After the final decree, the parties filed competing motions to alter or amend the decree. In resolving the motions, the trial court altered its decree in part to award all 6500 shares of the BFS stock to Husband.⁴ No further changes were made. Husband now appeals.

On appeal, Husband argues that the trial court erred by awarding Wife half of the funds held by the court clerk, while at the same time considering those funds in setting his *pendente lite* obligations. Husband also contends that the trial court's distribution of the marital estate was inequitable, and that it erred in awarding the federal income tax exemptions for all three children to Wife, and in requiring that Husband bear all of the children's transportation costs to visit him in Maryland. He asserts that Wife should have been deemed voluntarily underemployed for purposes of the child support award, and argues that the amount of alimony awarded exceeds both his ability to pay and Wife's need. Wife argues that the trial court's decision should be affirmed, and seeks her attorney's fees and costs on appeal.

We review the trial court's findings of fact *de novo* on the record with a presumption of correctness "unless the preponderance of the evidence is otherwise." Tenn. R. App. P. 13(d); **Campbell v. Fla. Steel Corp.**, 919 S.W.2d 26, 35 (Tenn. 1996). Its legal conclusions are reviewed *de novo* with no presumption of correctness. **Campbell**, 919 S.W.2d at 35.

We first address Husband's contention that the trial court in essence "double-counted" the funds held by the court clerk, by considering them in setting Husband's *pendente lite* obligations while also awarding half of them to Wife. As noted above, Husband was ordered to pay \$4,760 in spousal support and child support *pendente lite*. Subsequently, Husband received a bonus check of approximately \$137,000. Husband was ordered to use approximately \$30,000 of the check to satisfy the parties' 2005 joint tax obligation, and deliver the remaining \$107,000 to the court clerk. In the final distribution of the marital estate, the trial court awarded half of these funds to Wife and half to Husband. On appeal, Husband argues that this was erroneous because, essentially, the court double-counted his bonus as well as his base salary in setting his *pendente lite* obligation. Wife does not dispute that the trial court considered the entire bonus amount in setting the temporary support, but argues that the division of the bonus monies was not reversible error because Husband's dissipation of marital assets was taken into consideration.

The trial court was, of course, authorized to award temporary spousal support, otherwise known as alimony *pendente lite*, based on Wife's need and Husband's ability to pay. *See* T.C.A. § 36-5-121(b) (2005). Likewise, the trial court was authorized to award child support *pendente lite*, taking into account the children's needs and each spouse's ability to pay. *See* T.C.A. § 36-5-101(1)(1) (2005). For both, bonus monies received by the obligor spouse may be considered in setting the amount of support. *See, e.g., Davidson v. Davidson*, No. M2001-01830-COA-R3-CV, 2002 WL 31769205, *7 (Tenn. Ct. App. Dec. 11, 2002), *see also*, TENN. COMP. R. & REGS. 1240-2-4-.01(2)(a), 1240-2-4-.04(3)(a)(1)(v) (2006).

⁴Other changes involved issues surrounding the children's visitation and Husband's life insurance obligations, not at issue in this appeal.

The trial court may also order funds sequestered or held by the court clerk pending the outcome of the litigation and may divide those funds between the parties in its resolution of the litigation. In this case, the trial court did all of the above, in effect ordering Husband to satisfy his *pendente lite* obligations with money to which he had no access. Husband made this point to the trial court prior to trial, and during his trial testimony; his argument was considered and rejected by the trial judge.

While Husband made a legitimate argument to the trial court prior to trial, at this point, the issue before this Court is whether the trial court abused its discretion in its ultimate distribution of the marital property. In doing so, the trial court was entitled to consider a number of factors, including Husband's argument that the amount of his *pendente lite* support obligations had been established based in part on the bonus monies to which he had no access. It was also, however, entitled to consider other factors not favorable to Husband, such as Husband's dissipation of marital assets on his paramour and for other non-marital purposes. We are mindful that the standard of review for the trial court's division of the marital estate is an abuse of discretion. *Ford v. Ford*, 952 S.W.2d 824, 825 (Tenn. Ct. App. 1996) (quoting *Barnhill v. Barnhill*, 826 S.W.2d 443, 449 (Tenn. Ct. App. 1991)). Considering the overall distribution, we cannot say that the award to Wife of half of the bonus monies held by the court clerk amounts to an abuse of discretion.

Husband also argues that the trial court's distribution of the marital estate was inequitable, in that the trial court (1) failed to take into account Wife's alleged dissipation of marital assets, (2) inaccurately valued the parties' marital residence, and (3) awarded Husband assets that will incur tax consequences. Wife contends that Husband's challenge to the distribution of the marital estate should be dismissed because he failed to submit with his appellate brief an "orderly tabulation of all marital property" as required by Rule 7 of the Rules of the Court of Appeals.⁵ In the alternative, Wife maintains that the trial court's distribution of the marital estate should be affirmed.

⁵Rule 7 provides:

- (a) In any domestic relations appeal in which either party takes issue with the classification of property or debt or with the manner in which the trial court divided or allocated the marital property or debt, the brief of the party raising the issue shall contain, in the statement of facts or in an appendix, a table in a form substantially similar to the form attached hereto. This table shall list all property and debts considered by the trial court, including: (1) all separate property, (2) all marital property, and (3) all separate and marital debts.
- (b) Each entry in the table must include a citation to the record where each party's evidence regarding the classification or valuation of the property or debt can be found and a citation to the record where the trial court's decision regarding the classification, valuation, division, or allocation of the property or debt can be found.
- (c) If counsel disagrees with any entry in the opposing counsel's table, counsel must include in his or her brief, or in a reply brief if the issue was raised by opposing counsel after counsel filed his or her initial brief, a similar table containing counsel's version of the facts.

Tenn. Ct. App. R. 7 (briefs in domestic relations cases). Rule 7 goes on to put forth the form, mentioned in part (a), to which an appellant's form should be "substantially similar." *Id.*

We agree with Wife's contention that Husband's brief does not comply with Rule 7.⁶ While Husband's failure to comply is a factor to be noted, we will nevertheless consider the merits of his argument.

We consider first Husband's assertion that Wife's failure to heed his entreaties to sell the BFS stock amounted to a dissipation of marital assets. Tennessee Code Annotated § 36-4-121 provides that, in dividing the marital estate, the trial court may take into account the "contribution of each party to the . . . preservation . . . or dissipation of the marital or separate property." T.C.A. § 36-4-121(c)(5) (2005). Dissipation is not defined by statute, but Tennessee courts have noted that the "concept of dissipation is based on waste." *Williams v. Williams*, No. E2004-02439-COA-R3-CV, 2005 WL 2205913, *9 (Tenn. Ct. App. Sept. 12, 2005 (citing *Altman v. Altman*, No. M2003-02707-COA-R3-CV, 2005 WL 819733, at *3-4 (Tenn. Ct. App. Apr. 7, 2005))). It has been described as one spouse's use of marital property "frivolously and without justification, for a purpose unrelated to the marriage and at a time when the marriage is breaking down," and characterized as involving "intentional and purposeful conduct that has the effect of reducing the funds available for equitable distribution." *Id.* One factor to be considered in determining whether a spouse has dissipated marital property is whether the allegedly dissipating spouse "intended to hide, deplete, or divert a marital asset." *Id.* Here, Husband does not accuse Wife of misusing marital assets. Rather, he argues that Wife's purportedly foolish refusal to sell the BFS stock resulted in the loss of its value, asserting in essence that she failed to act to preserve a marital asset. *See Flannary v. Flannary*, 121 S.W.3d 647, 652 (Tenn. 2003) (husband removed marital funds from a bank account and hid the cash in a bedroom drawer, based on his fears surrounding Y2K, and the cash "disappeared.") *See also* Lee R. Russ, Annotation, *Spouse's Dissipation of Marital Assets Prior to Divorce as a Factor in Divorce Court's Determination of Marital Property*, 41 A.L.R.4th 416, § 11 at 436 (1985) (Supp. 2006) (citing cases in which inaction amounts to dissipation, as in failure to make mortgage payments on marital home, resulting in foreclosure).

With benefit of hindsight, we see that Husband's prediction that the value of the BSF stock could drop was correct. Wife, however, was not required to be clairvoyant or to simply accept Husband's investment advice. Had the stock been sold and the value thereafter rose dramatically, would this amount to dissipation by Husband? In explaining her refusal to sell the BSF stock, Wife testified that she considered the stock to be a long-term investment, and there is no evidence indicating that Wife's refusal to sell was intended to deplete a marital asset, or that it was a careless wasting of marital property. Husband's argument is without merit.

Husband also argues that the trial court erred in valuing the marital home at \$462,000. As stated above, we review findings of fact *de novo* on the record with a presumption of correctness unless the evidence preponderates otherwise. Tenn. R. App. P. 13(d). The trial court's valuation was based on Wife's testimony that, when the house was put up for sale, the parties received an offer to purchase for \$462,000. The trial court credited this testimony over Husband's testimony that the

⁶In Husband's brief, he provides no list of the parties' separate property, no list of the marital or separate debt, and no reference to the valuations asserted by either Wife or Husband. He lists the trial court's valuation of the marital assets, but with no citations to the record. *See* Tenn. Ct. App. R. 7.

home was appraised at a higher value. We see no error in the trial court's decision to credit an actual offer to purchase over an appraisal in its valuation of the property. Accordingly, we affirm the trial court's finding with regard to the value of the marital home.

Husband contends that the trial court's distribution of the marital property awarded him a disproportionate amount of assets with the potential for severe tax consequences if he accesses them. Trial courts are granted wide discretion in the division and distribution of marital assets. *Ford v. Ford*, 952 S.W.2d 824, 825 (Tenn. Ct. App. 1996) (quoting *Barnhill v. Barnhill*, 826 S.W.2d 443, 449 (Tenn. Ct. App. 1991)).

Under Tennessee Code Annotated § 36-4-121(c)(9), the trial court may take into consideration the tax consequences associated with assets awarded in the division of marital property. Tax consequences, however, are only one of numerous factors that the trial court must consider in its division of the marital estate. *See generally* T.C.A. § 36-4-121(c)(1)-(11). Other factors to be considered include dissipation of marital assets, the "relative ability of each party for future acquisitions of capital assets and income," and the value of each party's separate property. *Id.* § 36-4-121(c)(4), (5), (6). The record indicates that the trial court considered the relevant statutory factors, and we find no abuse of discretion in its division of the marital property. Therefore, the trial court is affirmed on this issue.

Husband next challenges several aspects of the parenting plan order adopted by the trial court. He first argues that the trial court erred in awarding Wife the federal income tax exemptions for all three children. Husband contends that, at the hearing in the trial court below, the parties stipulated that Wife would receive the exemptions for two of the children and Husband would be awarded the exemption for one child. In the alternative, Husband argues that he should receive at least one exemption under the facts. Wife maintains that there was no stipulation and argues that the award of all three exemptions to her should be affirmed.

We consider first Husband's contention that the parties entered into an oral stipulation on the exemptions, to which they should be bound. A stipulation is, by definition, "an agreement 'which is entered into mutually and voluntarily by the parties.'" *Hyneman v. Hyneman*, 152 S.W.3d 549, 555 (quoting *Overstreet v. Shoney's, Inc.*, 4 S.W.3d 694, 701 (Tenn. Ct. App. 1999)). As a general rule, parties are bound by oral stipulations made at trial. *State, Dep't of Highways v. Urban Estates, Inc.*, 465 S.W.2d 357, 360 (Tenn. 1971). From our review of the exchange between the attorneys at the outset of the hearing, set forth in footnote 3 above, there does not appear to be an agreement to which both parties intended to be bound. Moreover, the subsequent testimony of the parties does not indicate that they understood that they had an agreement; Husband testified that he should be given the tax exemptions for all three children, while Wife asserted that she should be awarded the exemptions for two children and Husband should be awarded the exemption for one. The proposed parenting plans did not include the same proposals regarding the tax exemptions, and neither party's plan was consistent with the testimony of the party proposing the plan. Under all of these circumstances, we do not find that the parties entered into a stipulation on the exemptions to which they should be bound.

Consequently, we consider Husband's alternative argument that, under the facts in this case, the trial court erred in awarding the exemptions for all three children to Wife. The Child Support Guidelines for Tennessee assume that the primary residential parent will claim the tax exemptions for the parties' children. TENN. COMP. R. & REGS. 1240-2-4-.03(6)(b)(2)(ii) (2006). The trial court, however, may award the exemptions to the alternate residential parent as the circumstances dictate. *See Eaves v. Eaves*, No E2006-02185-COA-R3-CV, 2007 WL 4224715, *8 (Tenn. Ct. App. Nov. 30, 2007). On appeal, the trial court's allocation of the federal income tax exemptions for minor children are reviewed for an abuse of discretion. *Chandler v. Chandler*, No. W2006-00493-COA-R3-CV, 2007 WL 1840818, *9 (Tenn. Ct. App. June 28, 2007). In reviewing for an abuse of discretion, we seek to determine whether the factual basis for the trial court's decision is supported by sufficient evidence; whether the decision results from the correct identification and application of the relevant legal rules; and whether the decision is within the "range of acceptable alternatives." *BIF, a Div. Of Gen. Signals Controls, Inc. v. Serv. Constr. Co., Inc.*, No. 87-136-II, 1988 WL 72409, *3 (Tenn. Ct. App. July 13, 1988). The decision to award the exemption "should rest on the facts of the particular case." *Chandler*, 2007 WL 1840818, at *9.

In its ruling, the trial court did not explain its reasoning for awarding Wife the exemptions for all three children, despite her testimony that she had no objection to Husband claiming the exemption for Justin. Because the trial court made no findings of fact with regard to this award, "it is our duty to review the record *de novo* to determine if there is sufficient evidence therein to support the [Chancery Court's] judgment." *Travis v. Travis*, No. E2000-01043-COA-R3-CV, 2001 WL 261543, *5 (Tenn. Ct. App. Mar. 16, 2001) (citing *Goodman v. Memphis Park Comm'n*, 851 S.W.2d 165 (Tenn. Ct. App. 1993)).

We have, on occasion, reversed the trial court's award of the federal tax exemptions to the primary residential parent, where the alternate residential parent had substantial income and need for the exemptions and Wife had little or no income apart from spousal support. *See Burnett v. Burnett*, No. W2007-00038-COA-R3-CV, 2008 WL 727579, *10-11 (Tenn. Ct. App. Mar. 19, 2008) (noting that counsel for the wife conceded at trial that the exemptions should be awarded to the husband). Here, Wife is working part-time and plans to return to school to obtain a teaching certificate, so she will be earning some income apart from spousal support, albeit much less than Husband. Particularly in light of the *de minimus* amount of income currently being earned by Wife, and Wife's concession that Husband should receive the exemption for one child, the question of whether the trial court erred in not awarding Husband one exemption is close indeed. Overall, however, we cannot say that the trial court's decision is not within the "range of acceptable alternatives." *BIF*, 1988 WL 72409, at *3. Accordingly, the trial court's decision on this issue is affirmed.

Husband also appeals the requirement in the parenting plan that he be responsible for cost of transporting the children to and from Maryland to visit him. He argues that Wife should bear half of these costs. In the alternative, he argues that his child support obligation should be revised downward to offset the transportation costs. Wife responds, "[Husband's] relocation is not a situation created by the [Wife], and she should not have to bear any of the costs of transportation of the minor children."

Husband contends that he moved to Maryland based on the understanding that Wife also planned to move to the Maryland/Virginia area. The only evidence in the record of such an agreement is Husband's own testimony, along with his concession that part of his motivation for moving to Maryland may have been a desire to be closer to his girlfriend. Wife disputed any agreement for her and the children to move to the Maryland/Virginia area, and it appears that the trial court implicitly credited her testimony. More importantly, the trial court concluded that Husband has the ability to pay for the transportation expenses, and the record supports this finding. Under these circumstances, we find no error in the trial court's requirement that Husband pay all of the children's transportation expenses.

Husband argues in the alternative that he should receive a downward deviation in his child support obligation, based on his responsibility for transportation expenses. The Child Support Guidelines are applied "as a rebuttable presumption." T.C.A. § 36-5-101(e)(1)(A) (2005). A deviation from the Guidelines should be granted only upon a finding that, if applied, they would be "unjust or inappropriate." *Id.* The Guidelines set out procedures to be followed in approving such a deviation. TENN. COMP. R. & REGS. 1240-2-4-.07 (2006). Regarding travel expenses, the Guidelines state:

If parenting time-related travel expenses are substantial due to the distance between the parents, the tribunal may order the allocation of such costs by deviation from the [presumptive child support obligation], taking into consideration the circumstances of the respective parties as well as which parent moved and the reason that the move was made.

TENN. COMP. R. & REGS. 1240-2-4-.07(2)(c). Here, the trial court clearly considered all of the attendant circumstances, including the fact that Husband has considerably greater earning power than Wife, and that his decision to move to Maryland was made in part to accommodate his desire to live closer to his girlfriend. Under these circumstances, we see no error in the trial court's decision not to grant Husband a downward deviation in his child support obligation.

In his final challenge to the parenting plan, Husband argues that the trial court erred by not finding Wife to be voluntarily underemployed, based on her education and past employment. Even assuming Wife was not voluntarily underemployed, Husband contends that Wife's income should have been considered in the calculation of his child support obligation. Wife contends that the only child support worksheet in the record was submitted for purposes of establishing temporary child support, and asserts that the parties agreed to the terms of the temporary child support order.

A trial court's determination that a parent is voluntarily underemployed is "a fact question, and the trial court has considerable discretion in its determination." *Willis v. Willis*, 62 S.W.3d 735, 738 (Tenn. Ct. App. 2001) (citing *Brooks v. Brooks*, 992 S.W.2d 403, 409 (Tenn. 1999)). The Guidelines provide a list of factors to be considered in making such a determination. TENN. COMP. R. & REGS. 1240-2-4-.04(3)(a)(2)(iii). These factors include, *inter alia*, the parent's "past and present employment;" "education, training, and ability to work;" and "extravagant lifestyle, including ownership of valuable assets and resources . . ." *Id.* Here, we cannot ignore the fact that Wife's prior employment was as a lower-level clerical employee, that she has been out of the

workforce since the parties' oldest child was born, per the parties' agreement, and that she has been designated as the children's primary residential parent. Based on the record before us, we cannot conclude that the trial court abused its discretion in declining to find that Wife was voluntarily underemployed.

Husband argues, in the alternative, that the parenting plan order was in error by not considering Wife's income to be greater than zero. The only child support worksheet in the record is the worksheet that was attached to Husband's proposed temporary parenting plan, submitted well before the final hearing, which lists zero income for Wife. *See supra*, note 1. Husband's permanent child support obligation is identical to his temporary child support obligation, and he points to no new child support worksheet submitted.⁷ Furthermore, Husband's proposed final parenting plan, which accompanied his trial memorandum, contains no new information regarding either his or Wife's gross monthly income.⁸ Therefore, nothing in the record indicates that Husband raised the issue in the lower court that Wife's income should be considered to be greater than zero for purposes of calculating his child support obligation. As such, we affirm the trial court's parenting plan order with respect to Husband's child support obligation. *See* Tenn. R. App. P. 36(a).

Husband's final issue on appeal concerns spousal support. He argues that the trial court erred when it awarded Wife \$2,000 per month⁹ of rehabilitative alimony for 120 months, because this award was in excess of both his ability to pay and Wife's need.

Guidelines for the determination of spousal support are set forth at Tennessee Code Annotated § 36-5-121. The two most important factors to consider are the obligor spouse's ability to pay and the disadvantaged spouse's need. *Aaron v. Aaron*, 909 S.W.2d 408, 410 (Tenn. 1995) (quoting *Cranford v. Cranford*, 772 S.W.2d 48, 50 (Tenn. Ct. App. 1989)). The amount of support awarded "is a matter for the discretion of the trial court in view of the particular circumstances." *Id.* (quoting *Ingram v. Ingram*, 721 S.W.2d 262, 264 (Tenn. Ct. App. 1986)).

The evidence in the record does not preponderate against the trial court's finding that Husband had the ability to pay the level of spousal support awarded. His income tax returns indicate that he has earned well in excess of \$200,000 per year for the last several years, and the parties had little marital debt. Moreover, Husband's spending on trips and gifts for his girlfriend undercuts his argument that he does not have the ability to pay spousal support. We find no error in the trial court's finding that Husband had the ability to pay the amount of spousal support awarded.

⁷Wife asserts in her appellate brief, "Neither party submitted a new or different Child Support Worksheet to the Trial Court on the date of the final hearing."

⁸The form used for Husband's proposed final parenting plan has blank spaces for financial information to be used in calculating child support payments. Those blanks were never filled in. Additionally, Husband did not raise the issue of Wife's income in his motion to alter or amend the final decree.

⁹Husband's appellate brief states that Wife was awarded \$2,400 per month in rehabilitative alimony. The record reflects that the trial court awarded only \$2,000 per month.

Regarding Wife's need, it is clear that Wife was earning little income at the time of the hearing below. She testified that she intended to return to school to acquire her teaching certificate. In its ruling, the trial court explained that the spousal support award was determined with reference to the age of the parties' youngest child. Ten years, however, seems to be an overly long rehabilitation period in light of Wife's age and educational level, her testimony that she could receive her teaching certificate in three years, and the fact that none of the parties' children have special needs that would unduly interfere with her ability to work outside the home. In light of these facts, we vacate the spousal support award insofar as it requires payment of a constant amount for ten years, and remand for the trial court to consider a shorter period of time or a "tapering off" of the amount, as the parties' children reach majority.

Wife argues as her only issue on appeal that she should be awarded her reasonable attorney's fees and costs on appeal. We decline Wife's request for costs and fees.

In conclusion, we vacate the period of time for the award of rehabilitative alimony, and remand for a redetermination of the period of time for the award. The remainder of the trial court's order is affirmed.

The decision of the trial court is affirmed in part, vacated in part, and remanded for further proceedings not inconsistent with this Opinion. Costs of this appeal are to be taxed one-half to Defendant/Appellant James Erdine Long, and his surety, and one-half to Plaintiff/Appellee Sharon Kay Long, for which execution may issue if necessary.

HOLLY M. KIRBY, JUDGE